SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 614

THE AVIATION CORPORATION,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BASIL O'CONNOR,
JOHN F. O'RYAN,
JOHN E. HUGHES,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

The Aviation Corporation, by its counsel Basil O'Connor, John F. O'Ryan and John E. Hughes, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered in the above entitled cause on June 1, 1942, dismissing petitioner's petition.

Opinion Below.

The opinion of the Court of Claims (R. 30) is reported in 46 F. Supp. 491.

Jurisdiction.

The judgment of the Court of Claims was entered on June 1, 1942 (R. 38). A motion for a new trial was denied October 5, 1942 (R. 38). The jurisdiction of this Court is invoked under U. S. C., Sec. 288, Title 28.

Questions Presented.

Did the Court of Claims err in failing to hold that under the decision of this Court in *Botany Mills* v. *United States*, 278 U. S. 283, a tax compromise contract cannot be made, except as prescribed by the Act of May 10, 1934 (Brief, page 18), which was a reenactment in identical terms of the statute construed by this Court in the foregoing case?

Can the United States retain $350,293.29 of a taxpayer's money, as an alleged tax for 1929, if taxpayer did not owe any tax for said year?

Assuming, but not conceding, an otherwise valid compromise contract was made for such year, does the consideration for such contract fail if taxpayer owed no tax?

If the answer to the above questions should be unfavorable to petitioner then these questions are presented:

Does a tax compromise exist in a case where a taxpayer pays the full amount of tax, penalty and interest claimed from it and assessed against it—if the respondent dismissed indictments against innocent men,[1] in which taxpayer was not a defendant (i. e., indictments against former officers of taxpayer and its long dissolved transferor corporation)?

If a compromise had been made would it be void for duress?

Did the provision in the settlement agreement that any error in computation in favor of either party should be subsequently adjusted (R. 17) leave plaintiff free to prove that a correct computation would show no tax due from it?

Does the power exist to compromise taxes due from a solvent taxpayer?

Are there any bars to a suit to recover overpaid taxes other than those expressly provided by Statute?

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[1] The presumption of law is that the defendants were innocent. If petitioner owed nothing they certainly were innocent. Only if petitioner owed nothing can it recover. The allegations of its petition showing it owed nothing were not denied.

Statement.

The court below held petitioner's suit was barred by a compromise made September 10, 1935, and that it could not consider whether petitioner owed nothing.

Petitioner filed its petition in the court below stating an unquestioned cause of action for the recovery of taxes (R. 1).

Respondent filed a general traverse but, by leave of the court, withdrew it and filed a plea in bar (R. 5) which alleged petitioner could not sue for the tax claimed to be overpaid because the tax, penalty and interest sued for was compromised, in that, in consideration of its payment by petitioner corporation, respondent had dismissed certain indictments against individuals named (R. 6, 7). Petitioner filed a reply (R. 8).

The court below did not allow petitioner an opportunity to prove that it owed no tax, but limited the hearing to respondent's plea in bar and its Commissioner sustained respondent's objection to petitioner's offer to prove none of the tax sued for was owed and declined to receive any evidence tending to show this.

The facts alleged in the petition are not denied nor put in issue (R. 5). At this point we ask your honors to read the pleadings to avoid extending the record by restating them here.

This suit was brought to recover $350,293.29, composed of a 1929 income tax of $195,798.36, a fraud penalty of $98,899.18, plus interest on said tax (assessed and paid) of $56,595.75.

This sum was paid to respondent on September 10, 1935 (except $760.95 thereof which was paid November 26, 1935). Claim for its refund was filed August 25, 1937, and disallowed May 27, 1938. This suit was filed May 9, 1940.

The sum sued for was collected from plaintiff as transferee of the Universal Aviation Corporation, which was

dissolved April 24, 1931, and for a 1929 income tax alleged to be due from it.

The sum thus collected was on the alleged income of the Universal Aviation Corporation, dissolved over four years before the money was paid, for the taxable year 1929. Its return was filed May 15, 1930. Unless this return was false and fraudulent the statute of limitations expired on May 15, 1932—about a year after it was dissolved and about two years before any claim for the sum sued for was ever considered, thought of or asserted by respondent.

The allegations of the petition that the return was not false and fraudulent; that the statute of limitations had expired when the money here sued for was paid (see sec. 3770 (a) (2) of the Internal Revenue Code) and that, on the merits, for the reasons stated in the petition, no part of the sum so collected was ever due and owing to defendant, stand undenied, and for the purpose of the special plea, must be taken as true.

This special plea shows that on June 20, 1934 (more than two years after the limitation on the collection of tax had expired) two indictments were returned at St. Louis, Missouri, against former officers of petitioner's transferor, the Universal Aviation Corporation (dissolved more than three years before that date), and former officers of petitioner, the last of whom to sever his connection with petitioner had done so over eighteen months before the indictments were returned. (In a venue hundreds of miles from their homes.)

One indictment in one count charged conspiracy to defraud the United States. On its fact it was barred by limitations. *United States* v. *McElva and Crozier*, 272 U. S. 633. *Cf. United States* v. *Noveck*, 271 U. S. 201. The other count charged conspiracy to evade and defeat the income tax of the Universal Aviation Corporation (see section 37 of criminal code) and a wilful attempt to defeat and evade tax. (These counts did not charge a crime aris-

ing under the Internal Revenue Laws but one under section 37 of the Criminal Code. *United States* v. *Hirsch*, 100 U. S. 33, 34.)

The other indictments charged two former officers of the long dissolved Universal Aviation Corporation (who were never connected with petitioner) with wilfully attempting to defeat and evade the income tax of the long-dissolved Universal Aviation Corporation. (See section 146(b) of the Revenue Act of 1928.)

The defendants in the indictment pleaded not guilty and while the indictments were pending petitioner proposed to the Attorney General that if he would *nolle pros* the indictments it would waive appeal to the Board of Tax Appeals and immediately settled by payment the full amount of the government's claim against it as transferee of the Universal Aviation Corporation, provided that any error in computation of the tax in favor of either party should be subsequently adjusted. The Attorney General accepted this offer on September 10, 1935.

No closing agreement was signed, no form for an offer in compromise filled out. (The standard form is No. 656. For it see P. H. Tax Service, page 18,723.) No agreement that a claim or suit for refund of the money paid would not be filed was taken or required but on the contrary it was expressly provided any errors in the computation of the amount thus paid might be subsequently corrected and in the motion to *nolle pros* the indictments the government attorney stated:

> "The Attorney General has not attempted to compromise with the defendants with respect to the indictments."

The reason was stated by him in open court to be because a conspiracy case did not arise under the internal revenue laws. (See cases collected in *United States* v. *Rabinowitz*, 238 U. S. 78, and compare *The Whiskey Cases*, 99 U. S. 594.)

Concerning petitioner's points embodied in the above statement "Questions Presented" the court below said in its opinion:

> "Whatever may be the merit of any of these defenses, however, they are disposed of by the consumation of the compromise settlement." (R. 36)

It confined itself to determining whether a compromise had been made.

Specification of Errors to Be Urged.

The Court of Claims erred:

(1) In failing to hold no tax compromise contract was proved and in holding the facts found show a tax compromise and in ignoring the decision of this Court in *Botany Mills* v. *United States,* 278 U. S. 282, and failing to follow it.

(2) In failing to hold petitioner's case was not within executive order 6166, because it had not been referred to the Department of Justice.

(3) In failing to hold that if the case was within said order it was an invalid order.

(4) In holding that where a taxpayer pays every penny of tax, interest and penalty claimed to be due from it, the dismissal of criminal indictments against former officers of taxpayer and former officers of its long dissolved corporate transferee is a tax compromise contract which bars a suit to recover the amount of tax, penalty and interest paid on the ground that none of it was owed and hence respondent in equity and good conscience ought not to retain it.

(5) In holding, in effect, that assuming petitioner owed no tax for 1929 the respondent could retain $350,293.29 penalty and interest paid by it for 1929.

(6) In failing to hold there is no provision in the Statutes of the United States which bars a suit to recover taxes not owed and no exception in the statutory mandate that taxes paid after the statute of limitations had barred their collection shall be refunded. (Brief, page 19.)

(7) In failing to allow petitioner a trial on the merits and to consider the question whether any tax was due.

(8) In failing to hold there is a total failure of consideration for a compromise contract where no tax is due.

(9) In failing to hold if there was a compromise contract it was void for duress.

(10) In failing to hold the Statute specifically the method of making a compromise contract, cannot be amended or altered by an executive order.

(11) In dismissing the petition.

(12) In failing to hold the agreement of the parties that any error in the computation of the tax in favor of either party might be corrected, left it open to petitioner to show a proper computation would disclose no tax due.

Reasons for Granting the Writ.

The writ should be granted because it is unconscionable and we submit unthinkable, that this Court should approve the proposition that the United States can take and keep, under any circumstances, $305,293.29 of money *a taxpayer does not owe* and especially where it induces a taxpayer to pay the money by indicting for conspiracy (after the Statute of Limitations had barred the right to assess or collect any tax from taxpayer) and threatening to drag former officers of taxpayer hundreds of miles from home for trial unless taxpayer pays to the uttermost farthing the full amount of tax, penalty and interest claimed from it.

Second, the decision of the court below is contrary to *Botany Mills* v. *United States,* 278 U. S. 282, which holds a compromise contract cannot be made unless the provisions of the Statute (brief, page 18) authorizing it are strictly complied with and that this statute prescribes the exclusive method. There is no claim it was complied with. The plea in bar (R. 5-8) does not allege any facts showing compliance with the statute and there is no finding of any. The court below stated in its opinion (R. 33) that executive order 6166 (brief, page 20) authorized the Attorney General to compromise, but this order, by its express terms, embraces only "any case referred to the Department of Justice for prosecution or defense in the courts" and petitioner's case was never so referred and defendant's plea in bar does not so allege. Also, there is no fact finding that it was and such finding is indispensable to bring the case within the terms of the executive order. The only case referred there was a case of certain individuals not then connected with petitioner. (Finding 5, R. 13.)

Third, the decision of the Court of Claims is in conflict with *Cloister Printing Co.* v. *United States,* 100 F. (2d) 355 (C. C. A. 2nd), and *Staten Island Hygeia Co.* v. *United States,* 85 F. (2d) 68 (C. C. A. 2nd).

Fourth, the other reasons for granting the writ are stated in the assignment of errors at pages 6 to 7 hereof.

A brief, in support of this petition, is annexed.
All of which is respectfully submitted.

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